

Judgment | HKSAR v So Tsun Fung (FACC 3/2025; [2026] HKCFA 25)

On 17 June 2026, the Court of Final Appeal handed down its judgment on the constitutionality of section 27A of the Elections (Corrupt and Illegal Conduct) Ordinance (Cap 554), which makes it illegal conduct, during an election period, to engage in public activity inciting another person not to vote, or to cast an invalid vote.

The Appellant had reposted on his Facebook page a message urging electors to cast blank ballots at the 2021 Legislative Council General Election. He challenged section 27A as an unconstitutional infringement of the freedom of expression (Articles 27 and 39 of the Basic Law; Article 16 of the Bill of Rights) and of the right to equality before the law (Article 25 of the Basic Law; Articles 1 and 22 of the Bill of Rights).

The Appellant's Case

At the heart of the appeal lay a contention about the very purpose of elections: that the true purpose of holding an election is not the act of voting for its own sake, nor the maximisation of turnout, but to guarantee and give effect to the free expression of the will of the electors. On that view, abstention and the casting of an invalid vote are themselves expressions of the elector's will — a considered withholding of support — so that public advocacy of those choices serves, rather than undermines, the very object that elections exist to fulfil.

Central to this was the submission that negative voting is itself a form of effective participation in the electoral process, not a withdrawal from it. An elector who turns out to cast a blank or invalid ballot, or who abstains as a deliberate electoral statement, exercises the franchise rather than abdicating it: they engage with the process and register a considered position — the rejection of all the candidates on offer, or dissatisfaction with the choices presented or with the electoral system — which a positive vote for a candidate cannot convey. Such negative voting is, moreover, recognised within electoral systems themselves, whether through the counting of blank and invalid ballots or through dedicated “none of the above” mechanisms of the kind considered by the Supreme Court of India. Indeed, Hong Kong's own Chief Executive election builds in precisely such a safeguard: a candidate is returned only on securing more than 750 votes, and, where a single candidate stands, electors may cast a “not support” vote. Negative voting of this kind allows the electorate both to express dissatisfaction with the choice on offer and to withhold the mandate from a candidate who lacks majority support, thereby helping to ensure the representativeness of the winning candidate. So understood, negative voting is a designed feature for protecting the legitimacy of an election, not a means of undermining it. On the Appellant's case, the very principle invoked against him — that active voter participation strengthens democracy — therefore tells in favour of protecting the advocacy of negative voting, not against it: to encourage others to cast a blank or invalid vote is to encourage one recognised form of electoral participation and expression, and is qualitatively different from undermining an election.

That principle carries particular constitutional weight in Hong Kong. Under Articles 45 and 68 of the Basic Law, the methods for selecting the Chief Executive and for forming the Legislative Council are to be developed in the light of the “actual situation” in the HKSAR and in accordance with the principle of gradual and orderly progress, with the ultimate aim of universal suffrage. Because Hong Kong's political development is constitutionally tied to its “actual situation”, the free and undistorted expression of the electors' will — including the

expression of dissatisfaction through abstention or invalid voting — is essential: it is only through the genuine expression of that will that the “actual situation” can be accurately gauged. To criminalise the advocacy of negative voting therefore risks obscuring the very “actual situation” on which Hong Kong’s constitutional development depends.

The Appellant further submitted that freedom of expression is at its most important during an election period, and that, by singling out advocacy of one lawful electoral choice, section 27A discriminates on the ground of political opinion — a position supported by decisions of the UN Human Rights Committee and the European Court of Human Rights recognising that peaceful calls to boycott a non-compulsory election attract the protection of free expression.

The Court’s Decision

In a unanimous judgment delivered by Chief Justice Cheung, the Court dismissed the appeal and upheld the constitutionality of section 27A. On the points above, the Court took a different view of where the protected value lies. Where the Appellant located it in the free expression of the electors’ will, the Court located it in electoral participation and in the integrity, legitimacy and representativeness of the electoral system.

The Court held that there is a legitimate public interest in elections being conducted successfully and attracting broad participation, and that measures directed to promoting participation and to discouraging the boycott of elections are capable of serving a legitimate aim. The Government, the Court held, is not required to remain neutral as between the advocacy of all lawful electoral options: while an individual remains free to abstain or to cast an invalid vote, it is a different matter for voters to be publicly incited to do so on a mass scale, which the Court considered liable to undermine the legitimacy, credibility and representative character of the electoral process. In contrast to the Appellant’s characterisation of negative voting as a form of participation, the Court treated its public advocacy as, in substance, a call to boycott the election or the electoral system — holding, in rejecting the equality challenge, that advocacy of negative voting and advocacy of participation are not comparable. Section 27A was itself characterised as directed to protecting voters’ free choice from interference that is undue or manipulative.

The distinctive constitutional setting on which the Appellant relied — Hong Kong’s political development in the light of its “actual situation”, within the framework derived from Articles 45 and 68 of the Basic Law and reflected in the amended Annexes I and II — was approached by the Court not as a reason to protect the advocacy of negative voting, but as reinforcing the legitimacy and weight of the aim of safeguarding the reformed electoral system following the 2021 reforms initiated at the level of the National People’s Congress. Applying the four-step proportionality analysis, and adopting the more stringent “no more than necessary” standard of review, the Court found the restriction proportionate: it is confined to public activity during the election period, leaves private expression and individual voting choices unaffected, and is subject to statutory defences.

The judgment confirms that public incitement to abstain from voting, or to spoil a ballot, during an election period may be criminalised consistently with the constitutional guarantees of freedom of expression and equality, and offers significant guidance on the aims that the protection of Hong Kong’s electoral system may legitimately serve.

Carter Chim led Yvonne Leung of Erik Shum’s Chambers and Jason Szeto of Bernacchi Chambers for the Appellant, instructed by Ho Kan Lawyers.

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